STATE OF MICHIGAN

IN THE SUPREME COURT

(On Appeal from the Michigan Court of Appeals and the Circuit Court for the County of Wayne)

DESERAI LAWSON, Next Friend
Of ZHIMON BINGHAM, A Minor,

Plaintiff-Appellee,

-vs-

KREATIVE CHILD CARE CENTER, INC.,
~~a Michigan corporation~~,

Defendant-Appellant.

Supreme Court No: _____
COA: 256388 Opn 2/23/06
LC NO. 03-314614 NO
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NOTICE OF FILING APPLICATION

NOTICE OF HEARING

APPLICTION FOR LEAVE TO APPEAL ON BEHALF OF DEFENDANT-APPELLANT KREATIVE CHILD CARE CENTER, INC.

PROOF OF SERVICE

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FILED

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MICHIGAN SUPREME COURT

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SULLIVAN, WARD, ASHER & PATTON, P.C.

TABLE OF CONTENTS

SULLIVAN, WARD, ASHER & PATTON, P.C.

INDEX OF AUTHORITIES

Cases:

SULLIVAN, WARD, ASHER & PATTON, P.C.

Rules:

SULLIVAN, WARD, ASHER & PATTON, P.C.

STATEMENT OF ORDER APPEALED FROM

Defendant-Appellant Kreative Child Care Center, Inc., seeks either peremptory reversal or leave to appeal from a written opinion of the Michigan Court of Appeals dated February 23, 2006, which reversed a grant of summary disposition that had been entered in favor of the Defendant by the trial court and, thus, reinstated this action. The grant of summary disposition had been based on a finding that certain statements from the Plaintiff's minor, her then two-year old child, identifying the child's uncle as having committed a sexual assault upon him, were inadmissible hearsay and not encompassed within any exception to the hearsay rule. (See: Michigan Court of Appeals Opinion 2/23/06, attached hereto as **EXHIBIT L**).

Specifically, the Court of Appeals concluded that emergency room medical records which contained the physician's report of the mother's summary of the child's previous identification was admissible under MRE 803(4) as statements "for purposes of medical treatment or medical diagnosis in connection with treatment."

Primarily at issue is whether the child's initial identification of the uncle to his mother, essentially triple hearsay, was encompassed by MRE 803(4). In this regard, Defendant contends that the Michigan Court of Appeals erroneously extended to this action the Michigan Supreme Court's prior holding in People v Meeboer, 439 Mich 310, 322; 484 NW2d 621 (1992), that identification of a sexual assailant is medically relevant and admissible under MRE 803(4) when made directly by the child patient to the physician. For the reasons that are more fully elaborated upon in this Application, the Court of Appeals' extension of Meeboer to this action involving triple hearsay (e.g., the child's identification of his uncle to his mother, who then repeated it to the physician) is palpably erroneous. Further erroneous is the Court of Appeals' use of a *de novo*

SULLIVAN, WARD, ASHER & PATTON, P.C.

standard of review in determining the reliability of the underlying out of court identification when the more proper standard of review is the "abuse of discretion" standard.

Also at issue is the dispositive point that Defendant cannot be responsible for the entirely unforeseeable alleged criminal misconduct of the child's uncle taking place away from the Defendant's child care premises at the residence where both were temporarily staying. While fully briefed in both courts below, neither the trial court nor the Michigan Court of Appeals addressed this issue notwithstanding that the result is governed by Graves v Warner Brothers, 253 Mich App 486; 656 NW2d 195 (2002) and Babula v Robertson, 212 Mich App 45, 53; 536 NW2d 834 (1995).

SULLIVAN, WARD, ASHER & PATTON, P.C.

STATEMENT OF ISSUES PRESENTED

I. IS THE PLAINTIFF'S MINOR'S IDENTIFICATION OF HIS UNCLE AS THE PERPETRATOR OF HIS ALLEGED SEXUAL ASSAULT WHILE BEING BATHED BY HIS MOTHER, AS REPEATED BY HIS MOTHER TO AN EMERGENCY ROOM PHYSICIAN AND MEMORIALIZED IN MEDICAL RECORDS, ENCOMPASSED BY THE "MEDICAL TREATMENT" EXCEPTION TO HEARSAY, MRE 803(4)?

Defendant-Appellant says "No."

Plaintiff-Appellee says "Yes."

The trial court said "No."

The Michigan Court of Appeals said "Yes."

II. DOES DEFENDANT HAVE A DUTY TO PROTECT PLAINTIFF'S MINOR FROM THE UNFORESEEABLE CRIMINAL MISCONDUCT OF HIS UNCLE OCCURRING AWAY FROM THE DEFENDANT'S PREMISES AT A RESIDENCE WHERE BOTH WERE TEMPORARILY LIVING?

Defendant-Appellant says "No."

Plaintiff-Appellee says "Yes."

The lower courts did not address this issue notwithstanding that the issue was fully briefed in both Courts.

SULLIVAN, WARD, ASHER & PATTON, P.C.

STATEMENT OF FACTS

A. Background

The instant negligence action arises out of a series of events that allegedly occurred in late April 2002. Plaintiff Deserai Lawson alleges that Defendant day-care provider Kreative Child Care Center, Inc. ("Kreative") negligently released her then two-year old son[1], Zhimon Bingham, to his uncle Freddie Marks who subsequently sexually abused him. (*See* Plaintiff's Complaint, attached as **EXHIBIT A.)** After the minor was unable to provide firsthand, sworn testimony of the alleged assault, the trial court granted summary disposition in favor of Defendant due to the absence of admissible evidence that Mr. Marks abused the minor. The Court of Appeals reversed, and reinstated the action.

1. Deserai Lawson's Trip To Chicago

On ***Wednesday April 24, 2002***, Deserai Lawson's half sister, Nikki Lawson, agreed to baby-sit Deserai's son Zhimon through Sunday April 28, 2002 so Deserai could travel to Chicago, IL with a companion. Residing at the time with Nikki Lawson was her brother, Freddie Marks (and her mother and daughter). Deserai departed for Chicago at 3:00 a.m. on ***Thursday April 25, 2002***. (*See* Deposition Transcript of Deserai Lawson, p 34 attached as **EXHIBIT B.)**

Deserai and her companion unexpectedly cut their trip short and never obtained a hotel room in Chicago. (**EXHIBIT B,** pp 34-36.) Instead, Deserai and her friend decided to drive home after visiting various nightclubs until 6:00 a.m. on Friday morning. (**EXHIBIT B,** pp 34, 36.) Plaintiff claims she left Chicago on Friday morning at 5:00 or 6:00 a.m., but did not return to Detroit until after Zhimon's bedtime 14 hours later at 8:00 p.m. (**EXHIBIT B,** pp 36-39.)

[1] Zhimon was two years old in April, 2002 and is now approaching six years old.

SULLIVAN, WARD, ASHER & PATTON, P.C.

Deserai picked her son up at the Nikki Lawson's residence on ***Saturday, April 27, 2002*** around 1:00 p.m.

2. Nikki Lawson, Freddie Marks, and Kreative Child Care

Nikki Lawson lived with her mother, Vicki Lawson, her brother, Freddie Marks, and her daughter, Shannon. Nikki Lawson dropped Zhimon off at Kreative on ***Thursday, April 25, 2002***. Nikki Lawson testified that she had to attend school in the evening and called Melinda Perdue, the owner of Kreative, later that day to explain that she could not pick up Zhimon. (See Deposition Transcript of Nikki Lawson, p 13, attached as **EXHIBIT C.)** Nikki Lawson decided to have her brother, Freddie Marks, pick up Zhimon. (**EXHIBIT C,** p 13.)

Freddie Marks arrived at Kreative Thursday afternoon. Malinda Perdue demanded that Marks present a picture ID (Michigan State ID card) and his social security number. She could not obtain a driver's license number because he had no car. She handwrote Marks' personal information from his ID card on Kreative's "authorization for pick up" form as well as the time of pick up -- 3:20 p.m. (*See* Authorization Form, attached as **EXHIBIT D.)**

Freddie Marks testified that Nikki Lawson asked him to pick Zhimon up because she had to work. Marks further testified that Plaintiff Deserai Lawson knew before leaving for Chicago that Freddie would pick up Zhimon. (*See* Deposition Transcript of Freddie Marks, pp 36-37, attached as **EXHIBIT E.)** Freddie testified that he and Zhimon went to the bus stop outside the day care center where they started a 45 minute bus trip, with transfers, to the Lawson residence on Boleyn, in Detroit. Marks claims they arrived home at 4:03-4:05 p.m. **(EXHIBIT E,** pp 47-49.**)**

Freddie Marks testified that his mother, Vicki Lawson, arrived home 10 minutes later with Nikki's daughter, Shannon, who played with Zhimon shortly thereafter. (**EXHIBIT E,** p

SULLIVAN, WARD, ASHER & PATTON, P.C.

44, *See also* Deposition Transcript of Vicki Lawson, p 10-11, attached as **EXHIBIT F**.) Plaintiff's theory is that Freddie Marks sexually abused Zhimon at the Lawson home sometime that afternoon or evening.

However, the alleged assault was otherwise unwitnessed and Freddie Marks vehemently denies any wrongdoing. (*See* Marks' Dep. Trans., **EXHIBIT E,** pp 4-6.) Mr. Marks was never charged with any crime notwithstanding Deserai Lawson's complaint to police of alleged sexual abuse of her son.

Deserai Lawson picked Zhimon up when she returned from Chicago, without incident.

3. <u>Zhimon's Complaints and Subsequent Medical Treatment and Interviews</u>

Deserai Lawson testified that four days after the alleged incident occurred, on the evening of Monday, April 29, 2002, Zhimon told her "my butt hurts" and "Uncle Freddie checked out my butt" while she was drying him off after a bath. (**EXHIBIT D,** pp 48-49.) Freddie Marks was HIV positive.

Zhimon was seen the next morning at Children's Hospital. There, Deserai Lawson, but not Zhimon, complained of sexual abuse and potential exposure to HIV by Freddie Marks. His rectum was intact. **The hospital's records reports the child's history as relayed solely by Deserai Lawson.** (*See* Children's Hospital Medical Records attached as **EXHIBIT G.)**

Zhimon followed up with the immunology clinic at Children's Hospital. He was placed on three preventative HIV drugs, Ziagen, Zerit and Kaletra, for six weeks. He was tested two times for the HIV, with the last being in July, 2002. Both tests were negative. (See **EXHIBIT G.)**

Detective LaRosa of Sex Crime Unit interviewed the boy at home on May 9, 2002. (*See* Witness Statement, attached as **EXHIBIT H.**) Officer Larosa dismissed the complaint of

SULLIVAN, WARD, ASHER & PATTON, P.C.

sexual abuse because Zhimon was not competent to give a statement. (*See* Deposition Transcript of Nicole Larosa, p 16, attached as **EXHIBIT I**.)

Zhimon was unable to provide deposition testimony in this case.

B. Defendant's Motion For Summary Disposition and the Trial Court's Ruling

1. Summary of Arguments and Trial Court Ruling

Plaintiff's Complaint alleges negligent hiring, negligent supervision, and negligently releasing Zhimon to Freddie Marks. (*See* **EXHIBIT A**, ¶ 9.)

Kreative filed its Motion for Summary Disposition based primarily on three arguments: (1) that Plaintiff was unable set forth admissible evidence that Freddie Marks abused Zhimon (i.e., causation); (2) that Zhimon's injury was caused by Freddie Marks' alleged intentional, criminal conduct, which is not attributable, as a matter of duty or causation, to Kreative's conduct; and (3) that Plaintiff's damages were improperly speculative so as to bar recovery as a matter of law.

At the conclusion of a hearing held on June 4, 2004, the trial court (Wayne County Circuit Judge Robert Colombo) granted Defendant's Motion for Summary Disposition based on Plaintiff's failure to proffer admissible evidence that Freddie Marks sexually abused Zhimon Bingham. (*See* Transcript of Hearing, June 4, 2004, pp 7-15, attached as **EXHIBIT J**). The court thus found it unnecessary to rule on the other dispositive arguments of the Defendants (**EXHIBIT J,** p 15). A written order was entered on June 4, 2004 (see **EXHIBIT M** attached).

Ruling from the bench, Judge Colombo carefully reviewed and rejected each document submitted by Plaintiff as inadmissible hearsay. The court recognized that the records submitted by Plaintiff contained "hearsay within hearsay" (i.e., alleged statements from Zhimon to

SULLIVAN, WARD, ASHER & PATTON, P.C.

Deserai, repeated by Deserai to medical personnel.) (*See* **EXHIBIT J,** p 4.) The Court summarized Plaintiff's lack of admissible evidence as follows:

> "[Y]ou can get around the hearsay problem with respect to the mother telling the doctor it was Uncle Freddie but how do you get around the hearsay problem of the son telling the mother? I don't see how you've satisfied a hearsay exception"
>
> (**EXHIBIT J,** pp 4-5).

2. The Police Report

In dismissing the action, the trial court first rejected Plaintiff's attempt to use the police report (the "Preliminary Complaint Record," attached as **EXHIBIT K**) to establish that Freddie Marks abused Zhimon. Essentially, the police report states that Zhimon stated to Deserai that "his butt hurt," that "kids played with his butt" and that "uncle Freddie touched his butt." **(EXHIBIT K.)**

The trial court held that the police report constituted inadmissible hearsay according to People v McDaniel, 469 Mich 409, 413 (2003) because the report was "adversarial and establishes an element of the crime" and thus did not satisfy MRE 803(8) ("public records and reports" exception to hearsay rule). The court further held that the police report was inadmissible under MCR 803(6) (records of regularly conducted activity) since it was prepared in "anticipation of litigation." (*See* **EXHIBIT J,** pp 8-9.) **This ruling was unchallenged and undisturbed by the Michigan Court of Appeals.**

3. The Witness Statement

The trial court next rejected Plaintiff's reliance on the witness statement taken of Zhimon on May 9, 2002 by Police Officer Nicole Larosa of the Sex Crimes Unit. The Court found the statement inadmissible under MRE 803A (Hearsay Exception; Child's Statement About Sexual Act) since it did not corroborate any other testimony of Zhimon. The court also

SULLIVAN, WARD, ASHER & PATTON, P.C.

held that the statement was inadmissible under the hearsay "catchall exception" in MRE 803(24). (**EXHIBIT J,** pp 10-12.) **This ruling was unchallenged and undisturbed by the Michigan Court of Appeals.**

4. Medical Records

The trial court next rejected Plaintiff's assertion that the medical records were admissible to establish the sexual assault.

Here, the medical records include statements such as:

> 2 year old male, complains of a history of sexual abuse by his uncle 5 days ago. Uncle is known to be HIV+..... Details of the abuse are not clear, most likely there was penetration of the penis into the rectum, since the child complained of pain in this area.
>
> (*See* Medical Records, attached as **EXHIBIT G.**)

The trial court correctly noted that "according to the medical record, the complaint of pain in the rectum came from the child, Zhimon. It appears that the other information [e.g., identification of the uncle] came from his mother." (**EXHIBIT J,** p 13; bracketed information added).

The trial court rejected Plaintiff's argument that ***each*** level of "hearsay within hearsay" satisfied the hearsay exceptions and thus each proffered hearsay statement constituted admissible evidence of Freddie Marks' sexual assault of Zhimon. (**EXHIBIT J,** pp 13-15).

Specifically, the court held that although Zhimon's statement to his mother and the hospital that his rectum hurt was admissible under MRE 803(3) (then existing physical condition), the statements identifying Freddie Marks as the abuser was inadmissible hearsay. To wit: (1) Zhimon's statement to the hospital did not identify Freddie Marks as the sexual abuser, and (2) Zhimon's statement to his mother that Marks was the abuser, which she in turn passed on to the hospital, was not for purposes

SULLIVAN, WARD, ASHER & PATTON, P.C.

of medical treatment and thus did not satisfy MRE 803(4). (*See* EXHIBIT J, pp 14-15). In this regard the Court stated:

> **Although I agree that the mother can testify that Uncle Freddy was the perpetrator as part of giving a history pursuant to MRE 803(4), there is still the problem that the history given by Zhimon to his mother under 803(3) is not admissible.**
>
> **(EXHIBIT J, p 15.)**

As such, the court held that there was no admissible evidence that Freddie Marks abused Zhimon and thus no evidence of tending to show that Kreative caused Zhimon's damages (i.e., "but for" causation.) (**EXHIBIT J,** p 15.)

C. Court of Appeals Proceedings

Plaintiff filed an appeal from the summary disposition order with the Michigan Court of Appeals. In a written opinion dated February 23, 2006, the Court of Appeals reversed the summary disposition order an found that the medical records containing Deserai Lawson's description of Zhimon's earlier statements to her was admissible as an exception to the hearsay rule under MRE 803(4), governing "statements made for purposes of medical treatment or medical diagnosis in connection with treatment" (see: EXHIBIT L, pp 3-4). The Court of Appeals concluded that "identification of a sexual assailant is medically relevant and therefore the kind of statement admissible under MRE 803(4)" (Id, p 3). The Court of Appeals also concluded that the mother's statement to the doctor was admissible under MRE 803(4) even as a "third party's statement to a doctor" (Id).

From the February 23, 2006 Michigan Court of Appeals' opinion, Defendant-Appellee now seeks either peremptory reversal or leave to appeal.

SULLIVAN, WARD, ASHER & PATTON, P.C.

ARGUMENT I

THE TRIAL COURT PROPERLY GRANTED DEFENDANT'S MOTION FOR SUMMARY DISPOSITION WHERE PLAINTIFF FAILED TO PROVIDE ADMISSIBLE EVIDENCE THAT HER SON WAS ABUSED; HER SON'S EXTRA-JUDICIAL IDENTIFICATION OF HIS UNCLE AS THE ABUSER TO HIS MOTHER WAS NOT ENCOMPASSED BY THE MEDICAL TREATMENT EXCEPTION TO THE HEARSAY RULE.

A. Standard of Review

This Court reviews the trial court's decision to admit or exclude evidence for abuse of discretion, People v Aldrich, 246 Mich App 101, 113; 631 NW2d 67 (2001), (citing People v Starr, 457 Mich. 490, 494; 577 NW2d 673 (1998), including a decision to admit or exclude evidence under a hearsay exception. People v Katt, 468 Mich 272, 278; 662 NW2d 12 (2003), People v Geno, 261 Mich App 624, 631-632; 683 NW2d 687 (2004). However, preliminary questions of law such as whether a rule of evidence bars the admission of proffered evidence is reviewed *de novo*. Katt, supra.

An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no excuse for the ruling made. People v Snider, 239 Mich App 393, 419; 608 NW2d 502 (2000). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. People v Sabin (After Remand), 463 Mich 43, 67; 614 NW2d 888 (2000); Aldrich, supra at 113.

The standard of proof required to survive summary dismissal was recently articulated in Craig v Oakwood Hospital, 471 Mich 67; 684 NW2d 296 (2004):

> It is important to bear in mind that **a plaintiff cannot satisfy this burden** by showing only that the **defendant may have caused his injuries**. Our case law requires more than a mere possibility or a plausible explanation. Rather, a plaintiff establishes that the

SULLIVAN, WARD, ASHER & PATTON, P.C.

> defendant's conduct was a cause in fact of his injuries only if he "sets forth specific facts that would support a reasonable inference of a logical sequence of cause and effect." **A valid theory of causation, therefore, must be based on facts in evidence.** And while "'the evidence need not negate all other possible causes,'" this Court has consistently required that the evidence "'exclude other reasonable hypotheses with a fair amount of certainty.'" (emphasis added; internal citations omitted).
>
> 471 Mich at 87-88.

Appellate review of the trial court's decision to grant summary disposition is de novo. Spiek v Department of Transportation, 456 Mich 331, 337; 572 NW2d 201 (1998).

B. Introduction To Argument

Plaintiff's theory of liability against Kreative is that it negligently released Zhimon Bingham to his uncle Freddie Marks, who sexually abused Zhimon later that day. At issue is whether Plaintiff produced admissible evidence to the trial court in responding to Defendant's Motion for Summary Disposition to show that Freddie Marks abused Zhimon.

Below, the Michigan Court of Appeals held that Deserai Lawson's statements to the emergency room physicians at Children's Hospital (as memorialized in the hospital's records) that Zhimon advised her that Freddie Marks sexually abused him was admissible evidence which created an issue of material fact that the abuse occurred.

The issue, therefore, is whether each level of hearsay contained in Plaintiff's submission to the trial court was admissible under a recognized hearsay exception, including: (1) the medical records, (2) Deserai's statements to medical personnel regarding the statements made by Zhimon, and (3) Zhimon's statements to his mother. Because, at a minimum, the latter two layers of hearsay do not fall within a recognized hearsay exception, Plaintiff failed to submit

SULLIVAN, WARD, ASHER & PATTON, P.C.

admissible evidence that Freddie Marks abused the minor and peremptory reversal of the Court of Appeals' Opinion is warranted.

C. Controlling Standards Of Law – Hearsay

MRE 801(c) defines hearsay as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay evidence is inadmissible unless it comes within an established exception. MRE 802.

In order for hearsay within hearsay to be admissible, each part of the combined statement must conform with an exception to the hearsay rule. Maiden v Rozwood, 461 Mich 109, 121; 597 NW2d 817 (1999); Hewitt v Grand Trunk W.R. Co., 123 Mich App 309, 315-316, 333 NW2d 264 (1983). *See also* MRE 805, ("[H]earsay within hearsay" is admissible only "if each part of the combined exceptions conforms with an exception to the hearsay rule provided in these rules.")

Where the medical records contain a contested hearsay statement, that statement must also be admissible under a hearsay exception unless it qualifies as nonhearsay. Merrow v Bofferding, 458 Mich 617, 627; 581 NW2d 686 (1998), MRE 805. In this case, therefore, even assuming the medical records are admissible under Rule 803(6), Plaintiff must also establish that Deserai Lawson's statements to the "medical personnel" that Zhimon identified Freddie Marks as the abuser is admissible under a hearsay exception.

In turn, this requires that Zhimon's statement of identification to Deserai Lawson likewise constitutes an admissible hearsay exception because nowhere in the medical record did Zhimon himself state that Marks' was the abuser – that information was passed on solely by Deserai Lawson. Specifically, MRE 803(4) allows for the admission of:

SULLIVAN, WARD, ASHER & PATTON, P.C.

> "...statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment."

The supporting rationale for this hearsay exception is "(1) the self-interested motivation to speak the truth to treating physicians in order to receive proper medical care, and (2) the reasonable necessity of the statement to the diagnosis and treatment of the patient." Merrow, supra at 629, quoting Solomon v Shuell, 435 Mich 104, 119; 457 NW2d 669 (1990) [underscore added].

Rule 803(4) is limited to statements made "for purposes of medical treatment or medical diagnosis in connection with treatment." Thus, generally, statements of fault do not qualify as being necessary for treatment under Rule 803(4). In re Freiburger, 153 Mich App 251, 258; 395 NW2d 300 (1986). See also People v LaLone, 432 Mich 103, 111; 437 NW2d 611 (1989).

However, in People v Meeboer, 439 Mich 310; 484 NW2d 621 (1992) the Michigan Supreme Court held that hearsay identification by a child victim of sexual abuse, ***made directly to an attending physician***, may be admissible under MRE 803(4) only "if the court finds the statement sufficiently reliable to support that exception's rationale." 439 Mich at 330. The Supreme Court identified the following factors that the trial court should weigh in determining whether a particular statement was admissible. **These factors, many explicitly, presuppose that the identification occurred "in connection with" a medical exam:**

> Factors related to trust-worthiness guarantees surrounding the actual making of the statement include: (1) the age and maturity of the declarant, (2) the manner in which the statements are elicited (leading questions may undermine the trustworthiness of a statement), (3) the manner in which the statements are phrased

SULLIVAN, WARD, ASHER & PATTON, P.C.

> (childlike terminology may be evidence of genuineness), (4) use of terminology unexpected of a child of similar age, (5) who initiated the examination (prosecutorial initiation may indicate that the examination was not intended for purposes of medical diagnosis and treatment), (6) the timing of the examination in relation to the assault (the child is still suffering pain and distress), (7) the timing of the examination in relation to the trial (involving the purpose of the examination), (8) the type of examination (statements made in the course of treatment for psychological disorders may not be as reliable), (9) the relation of the declarant to the person identified (evidence that the child did not mistake the identity), and (10) the existence of or lack of motive to fabricate.
>
> Id. (citations omitted).

Thus, the Supreme Court in Meeboer held that statements made to treating medical health care providers by victims of child sexual abuse which identify their assailants are admissible under Rule 803(4) if (1) the evidence of trustworthiness is sufficient to establish that the child had a motivation to speak truthfully directly to treating physicians in order to receive proper medical care; and, (2) the statement was reasonably necessary for diagnosis or treatment. 439 Mich at 322, 324, 328, 333-334. In so holding, the Supreme Court reasoned that identification of the assailant can be as important to the health of the child as treatment of the physical injuries that are apparent to the physician. The Court stated in pertinent part that the assailant's identity "should be considered part of the physician's choice for diagnosis and treatment, allowing the physician to structure the examination and questions to the exact type of trauma the child recently received." Id, at 329.

In applying this rationale to the distinguishable facts of the companion case before it, People v Conn, the Meeboer Court found that the child victim's identification of her assailant to her physician was reasonably necessary for diagnosis and treatment. The Court reasoned:

> The doctor testified that he inquired into the identity of the assailant as an aid for diagnosis and treatment. He inquired into the identity of the assailant so he could scan for sexually

SULLIVAN, WARD, ASHER & PATTON, P.C.

> transmitted diseases. Furthermore, since the doctor learned that the assailant was a member of the victim's household, he in fact began her future treatment by alerting the authorities. [*Id.* At 334-335.]
>
> * * *
>
> ... Treatment and removal from an abusive environment is medically beneficial to the victim of a sexual abuse crime and resulted from the victim's identification of the assailant to her doctor. The questions and answers regarding the identity of her assailant can therefore be regarded as reasonably necessary to this victim's medical diagnosis and treatment. [*Id.* At 335.]

The Supreme Court in Meeboer considered its prior opinion in People v LaLone, 432 Mich 103; 437 NW2d 611 (1989), but did not overrule that opinion! Specifically, the Meeboer Court held that "we believe that neither the rationale supporting the medical treatment exception to the hearsay rule, MRE 803(4), nor our decision in LaLone requires the exclusion of all statements made to treating medical health care providers by the victims of child sexual abuse which identify their assailants...." 439 Mich at 315 [fn omitted].

In LaLone, the Michigan Supreme Court had previously held that MRE 803(4) may not serve as a basis for the admission of hearsay statements as to the identity of the perpetrator of a sexual assault. The Supreme Court in LaLone reasoned that it did not believe that the drafters of Rule 803(4):

> "...intended that the victim's naming of her assailant should be considered a description of the 'general character of the cause or external source' of an injury. To read the exception to provide for such hearsay, particularly in the context of psychological treatment, would clearly broaden the nature of the exception beyond the scope intended by its drafters."
>
> 432 Mich at 111.

The LaLone Court had further rejected resort to federal authority which expanded the scope of this hearsay exception under Federal Rules of Evidence 803(4) to allow for identification of sexual abuse assailants by their child victims to treating physicians. Id, at 114-

SULLIVAN, WARD, ASHER & PATTON, P.C.

115. The LaLone Court concluded that the MRE 803(4) must be given a more strict and narrow reading than the corresponding Federal Rule due to the difference in the language between the two rules. The Supreme Court observed:

> The federal rule permits the introduction of '[statements] made for purposes of medical diagnosis or treatment,' while the Michigan Rule requires that the diagnosis be **'in connection with treatment.'**
>
> 432 Mich at 114-115 [emphasis added].[2]

Applying the controlling authority to the instant case, Plaintiff Deserai Lawson's statements to medical personnel that Zhimon told her that Freddie Marks' abused Zhimon are inadmissible hearsay. As opposed to Meeboer, the medical records contain reference of Plaintiff's account to the physician of what her two-year old child told her on the prior day. (*See* ER records attached as **EXHIBIT G.**) For example, the ER record, signed by Nirmala Bhaya, M.D. states:

> The child was at the uncle's house over the weekend and he told his mother yesterday that he was touched down in the 'bottom parts.' When mom asked him in detail, showing him the dolls, he described that his penis was sucked by his Uncle Freddie. This happened probably, on April 26th. No description of anal penetration. No discharge. No bleeding. The Uncle is a known HIV with active disease on multiple medications."
>
> (*See* **EXHIBIT G.**)

Significantly, the identification of the abuser was not made by *Zhimon* to medical personnel as required by MRE 803(4) and Meeboer. The Court of Appeals here erroneously extended Meeboer to a statement made by a patient to a third person, who then related it to the physician. As recognized by both Meeboer and LaLone, Rule 803(4) specifically requires the statement to be made "in connection with medical treatment." The statement made by Zhimon

[2] As a result of this analysis, the Supreme Court in LaLone struck identification of a child's sexual assailant to the child's treating psychologist after the inception of the police investigation into the crime.

SULLIVAN, WARD, ASHER & PATTON, P.C.

to his mother while bathing was not made to a medical professional "in connection with medical treatment." Accord: Perez v State of Texas, 113 NW2d 819, 828 (Tex App 2003) [Rule 803(4)'s criteria requires "that the statement be made to medical personnel in the course of diagnosis and treatment..."], State v Allen, 755 P2d 1153, 1162-63 (Ariz 1988) [statement describing assault to mother inadmissible hearsay], Sharp v Kentucky, 849 SW2d 542, 545-546 (Ky 1993) [child statement of sexual assault to social worker inadmissible hearsay].

As a further error, the trial court's assessment of reliability under Meeboer should be subject to the abuse of discretion standard of review because it involves the balancing of several factors arising from evidence presented firsthand to that Court. People v Katt, supra. The Court of Appeals here committed reversible error in analyzing the reliability of the identification in the first instance as if under a *de novo* standard of review.

In any event, this hearsay evidence is untrustworthy in light of the enumerated factors of Meeboer. Zhimon was a ***two year-old*** who first identified Freddie Marks as the abuser ***four days after the incident*** and has never recalled the incident since that time.

Moreover, many of the statements in the ER record contradict other portions of the medical records. According to the Children's ER record, the incident occurred on April 26th. According to the Immunology Consult form, it occurred on April 25th. The immunology record states, "...Details of the abuse are not clear, most likely there was penetration of the penis into the rectum, since the child complains of pain in this area." (*See* **EXHIBIT G.**) As stated above, no foundation has been laid as to this record, i.e. who provided the info, who recorded it, what was said, did Zhimon state he had pain or did mom, etc.

SULLIVAN, WARD, ASHER & PATTON, P.C.

Further, one can see that the details given to F. Lubin of the Immunology clinic are starkly different than that given to Dr. Bhaya (no description of anal penetration, etc.) (*See* **EXHIBIT G**.)

Plaintiff also told Ms. Bell, a social worker, on June 18, 2002, that she went out of town on April 30, 2002. According to this record Plaintiff "arrived to pick up Zhimon at 5:00 p.m. and the child was crying." "On Sunday, the child spent the day with his grandmother." "On Monday, he stated "mama, my butt hurts." He also stated, "Kids play with my butt" and allegedly added "Uncle Fred checked out my butt." The record includes a statement that :the child spilled water, which prompted Uncle Fred to holler at him, then perform fellatio on the boy." (*See* Progress notes of Ms. Bell, dated June 18, 2002, attached as **EXHIBIT G**.)

Plaintiff filed a police report on April 29, 2002, which states that the abuse occurred sometime between Wednesday, April 15, 2002 at 8:00 p.m. and Saturday, April 18, 2002 at 6:30 p.m. (*See* **EXHIBIT K**.)

Plaintiff's and her child's statements as contained within these records are wholly inconsistent and do not satisfy the "reliability" test of Meeboer, even if Meeboer could be extended to third party statements to physicians. Review of these records demonstrates that the alleged statements made on behalf of the two-year old cannot be considered trustworthy, or otherwise admissible under MRE 803(4).

For these reasons, the trial court properly acted within the scope of its discretion when it granted summary disposition in favor of Defendant due to the lack of admissible evidence that the Plaintiff's minor was sexually assaulted by Freddie Marks. Contrary to the Court of Appeals' Opinion, Meeboer cannot be extended to this distinguishable circumstance involving

SULLIVAN, WARD, ASHER & PATTON, P.C.

triple hearsay. Yet, even if Meeboer could apply here, there was an insufficient showing of reliability to sustain the admissibility of the hearsay statements.

SULLIVAN, WARD, ASHER & PATTON, P.C.

ARGUMENT II

THE DEFENDANT OWED NO DUTIES TO PROTECT THE PLAINTIFF'S MINOR FROM THE UNFORESEEABLE CRIMINAL MISCONDUCT OF THIRD PARTIES SUCH AS THE MINOR'S UNCLE

A. Standard of Review

As this appeal is from an order granting summary disposition, appellate review is de novo. Spiek v Department of Transportation, 456 Mich 331, 337; 572 NW2d 201 (1998).

B. Kreative Is Not Liable for the Criminal Acts of Freddie Marks

Plaintiff's claims should have been dismissed on the additional basis that Zhimon's injury was caused by a third party's alleged intentional, criminal conduct, which was not foreseeable, nor attributable, as a matter of duty or causation, to Kreative's conduct. Kreative indeed argued to the trial court that it was not responsible for the criminal acts of Freddie Marks.[3] The trial court, however, did not address this issue in light of the other dispositive issue that Plaintiff failed to submit admissible evidence that the incident actually occurred. The Court of Appeals, however, omitted to address this issue as well, even though it was fully briefed. Since it is well settled that this Court will not reverse where the trial court reaches the correct result, albeit for a wrong reason, the trial court's order should be affirmed. Ellsworth v Hotel Corp, 236 Mich App 185, 190; 600 NW2d 129 (1999).

One generally has no obligation to anticipate the criminal acts of third parties. MacDonald v PKT, Inc, 464 Mich 322, 628 NW2d 33 (2001), Graves v Warner Brothers, 253 Mich App 486, 493; 656 NW2d 195 (2002). An intervening act of a third person is deemed a superseding cause of an injury if that intervening act was not foreseeable. Davis v Thornton,

[3] *See* Brief in Support of Defendant's Motion for Summary Disposition Pursuant to MCR 2.116(C)(10), pp 11-12.

SULLIVAN, WARD, ASHER & PATTON, P.C.

384 Mich 138, 148; 180 NW2d 11 (1970). "The questions of duty and proximate cause are interrelated because the question whether there is the requisite relationship, giving rise to a duty, and the question whether the cause is so significant and important to be regarded a proximate cause both depend in part on foreseeability." Babula v Robertson, 212 Mich App 45, 53; 536 NW2d 834 (1995), (quoting Moning v Alfono, 400 Mich 425, 439; 254 NW2d 759 (1977)). Of particular import to the instant appeal is the principle explained by Graves v Warner Bros., supra:

> ....[T]hat, in general, there is no legal duty obligating one person to aid or protect another. Moreover, an individual has no duty to protect another from the criminal acts of a third party in the absence of a special relationship between the defendant and the plaintiff or the defendant and the third party. The rationale underlying this general rule is the fact that "criminal activity, by its deviant nature, is normally unforeseeable." Our Court in Papadimas v Mykonos Lounge, 176 Mich. App 40, 46-47; 439 NW2d 280 (1989) (quoting Prosser & Keeton, Torts (5th ed), § 33, p 201), emphasized that "'**under all ordinary and normal circumstances, in the absence of any reason to expect the contrary, the actor may reasonably proceed upon the assumption that others will obey the criminal law.**'"
>
> 253 Mich App at 493. (emphasis added, internal citations omitted).

In Graves, (the "Jenny Jones case"), this Court held that the Jenny Jones Show owed no duty to a former show guest who was murdered by another person who participated in the same taping session. The murder occurred several days after the show and after both guests returned to their homes in another state. The court emphasized the distance of time and place, concluded that "under the circumstances defendants owed no legally cognizable duty to protect plaintiffs' decedent from the homicidal acts of a third party" and vacated the $29 million jury verdict. 253 Mich App at 488.

SULLIVAN, WARD, ASHER & PATTON, P.C.

The Graves Court applied tort rules governing commercial businesses where the owners and operators have a duty to use reasonable care which "is triggered by specific acts occurring on the premises that pose a risk of imminent and foreseeable harm to an identifiable invitee." Id. at 496-497. The Court of Appeals held that the relationships between the talk show and its guests were "of business invitor to invitee" and that "any duty ends when the relationship ends" id. at 498.

Of further import is Babula, supra, where this Court decided a case with facts strikingly similar to the present matter. In Babula, Plaintiff mother filed a negligence action against her sister and brother-in-law for the brother-in-law's sexual abuse of her minor child while her sister was babysitting the minor. 212 Mich App at 47-48. The Court of Appeals affirmed the trial court's order granting summary disposition. Id. at 54.

This court rejected the plaintiff's negligence claims, stating that criminal sexual conduct towards the plaintiff was "wholly unforeseeable" by the aunt. Id. at 53. The court further rejected Plaintiff's theory that "some harm" to the child was foreseeable. id. Finally, the court held that the uncle's actions was an unforeseeable intervening cause of the child's injury:

> Liability for negligence does not attach unless the plaintiff establishes that the injury in question was proximately caused by the defendant's negligence. Proximate cause means such cause as operates to produce particular consequences without the intervention of any independent, unforeseen cause, without which the injuries would not have occurred. Ordinarily, the determination of proximate cause is left to the trier of fact, but if reasonable minds could not differ regarding the proximate cause of the plaintiff's injury, the court should rule as a matter of law.
>
> 212 Mich App at 54 (citations omitted).

Applying these principles to the instant case, it was entirely unforeseeable to Kreative that Freddie Marks would sexually abuse Zhimon. Kreative owed no duty to protect Zhimon

SULLIVAN, WARD, ASHER & PATTON, P.C.

from the alleged criminal acts of Freddie Marks in the residence where both individuals were temporarily staying. Kreative's relationship with Zhimon clearly ended once Marks returned to that residence.

It is undisputed that Freddie Marks resided with Nikki Lawson while Zhimon was spending the weekend with Nikki. There is no evidence that Freddie Marks had a history of sexual abuse. There was no reason for Kreative to believe that Freddie Marks would sexually abuse Zhimon. Further, because Zhimon was spending the weekend in the same house as Freddie Marks, releasing Zhimon only to Nikki Lawson would not have changed the fact that Freddie Marks had an entire weekend during which he could have abused Zhimon. The record is indeed devoid of any evidence that Zhimon indicated when, where, or how the abuse occurred, and could have just as easily occurred during the three other days Zhimon was staying with Nikki Lawson.[4] The proximate factor causing Zhimon's alleged injury was the criminal acts of Freddie Marks.

The trial court should have granted summary disposition on this additional, independent basis. MCR 2.116(C)(10).

[4] Plaintiff asserts that Freddie Marks abused Zhimon upon returning to his house after picking him up from Kreative. However, Plaintiff fails to cite to any evidence in the record indicating when and where the incident occurred.

SULLIVAN, WARD, ASHER & PATTON, P.C.

CONCLUSION

For the foregoing reasons, Defendant-Appellee Kreative Child Care Center, Inc. respectfully requests that this Honorable Court either peremptorily reverse or grant leave to appeal from the Court of Appeals' Opinion dated February 23, 2006 -- and ultimately reinstate the trial court's Order Granting Defendant's Motion for Summary Disposition dated June 4, 2004.

Respectfully submitted,

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